93-477

CASE NO._____

SUPREME COURT, U.S.
FILED
JAN 15 1992
OFFICE OF THE CLERK

In The
Supreme Court of the United States

OCTOBER TERM 1991

JOHN DANIEL MACLEOD III,
Petitioner,

vs.

VIRGINIA BEACH CORRECTIONAL CENTER,
DEPUTY HALEY, ET. AL.,
Respondent,

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

John Daniel MacLeod III, pro se
Bland Correctional Center
Route 2, Box 143
Bland, VA 24315-9615

18 pp

QUESTION PRESENTED

(A) This case presents this Court with an absolute obligation to reaffirm the sanctity of constitutionally guaranteed due process whenever significant liberty interests are jeopardized.

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A. This case presents this Court with an absolute obligation to reaffirm the sanctity of constitutionally guaranteed due process whenever significant liberty interests are jeopardized. i

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioner, John Daniel MacLeod III, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit entered in the above-entitled cause on September 13, 1991.

I.
OPINION BELOW

The Slip opinion of the District Court is attached as Appendix A. The Judgment of the Court of Appeals is attached as Appendix B. The Court of Appeals denial of the Appellants Petition for Rehearing is attached as Appendix C.

II.
JURISDICATION

The Court of Appeals denial of the Appellant's Petition for Rehearing was entered on October 18th, 1991. The original of this Petition was received by the Clerk on January 15, 1992. (See Appendix D). The jurisdiction of this Court is invoked pursuent to 28 U.S.C. §1254(1).

III.
CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment of the United States Constitution provides:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces or in the Militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall he be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

IV.
STATEMENT OF THE FACTS

On July 8th, 1990, the Petitioner in this matter, John D. MacLeod III, was maliciously charged with a major violation of the rules of the Virginia Beach Correctional Center where he was being detained as a pretrial detainee by probationary Sheriff's Deputies as part of a blanket retaliation against other inmates with whom they had been involved in a verbal conflict earlier the same morning.

Knowing that his liberty interests in pre sentence reporting and parole consideration would be grieviously prejudiced by such a charge if it were not promptly and conclusively refuted, the Petitioner immediately protested. (the Petitioner has since filed the affidavit of another inmate who was denied parole as a direct result of just such an unresolved charge)

In response to the Petitioner's protest an attempt to coverup the incident was followed by the creation of an altered version of the original untenable violation report and the Petitioner being selectively and unjustifiably locked down and denied visitation by the watch commander who exceeded his authority in doing so while the Commanding Officer of Corrections was present at the facility.

Early the following morning, July 9th, 1990, the Petitioner was released from cell restriction and issued a copy of the second version of the violation report which stated that the charge had been "Dismissed with a warning" which being tantamount to a motion to nolle prosequi inferred that he was, in fact, guilty of the offense but had not been prosecuted for reasons unknown and therefore eliminated only the immediate, and rather inconsequential, threat of disciplinary action while doing little if anything to eliminate the significant threat to his future liberty interests.

On July 13th, 1990, the Petitioner met with The Commanding Officer of Corrections, W. C. Smith, and requested that the matter proceed to the normal board hearing so that he could exonerate himself. Mr. Smith flatly refused to allow the matter to go forward stating that he had done everything he was going to do.

On July 29th, 1990 the Plaintiff filed suit in the United States District Court alleging that Deputy Haley and other as yet to be conclusively inculpated employees of the Virginia Beach Correctional Center had conspired to accuse and convict him of a major violation of the rules of that facility when, in fact, no such offense had been committed; that he had been unjustifiably restricted to his cell and denied his state created liberty interest in visitation with his sister and her family who had, coincidentally, been in route from their home in Boston, Massachusetts at the time of the incident; that he had been denied due process in bringing the matter to a proper resolution.

As relief, the Petitioner sought, first and foremost, his Constitutionally guaranteed right to due process in bringing the matter to a proper resolution and reasonable compensation for his sister as well as reasonable punitive damages due to the flagrance of the violations of the Petitioner's rights which damages, it was originally intended, would be forgiven in a settlement of the matter if the Correctional Center would make a good faith effort to guard against future abuses by having sequentially numbered and accounted for violation reports printed which, in the instant case, would have

bound the probationary Deputies by their original report and eliminated the temptation to attempt the coverup they chose to pursue.

As a direct result of the District Courts refusal to make allowance for the fact that the Petitioner had only become indigent shortly before the suit was filed the matter was delayed for an inordinate eight months during which time the Petitioner was selectively denied access to the Courts though having been forced to assume his own defense against the serious criminal charge for which he was being detained, was convicted of that charge as a direct result of his lack of access to the courts, was ultimately denied the benefits of a pre-sentence report, and remains in jeopardy of unfavorable consideration in his upcoming parole hearings due to the matter remaining unresolved.

The Defendants were finally compelled to respond on February 7th, 1991, and as might have been expected avoided answering by filing an untenable 12(b)(6) Motion in which a halfhearted attempt was made to confine the matter to the relatively inconsequential denial of visitation claim and thereby assert that the Petitioner had failed to state a cognizable claim. Though it should not have been necessary for him to do so, the Petitioner filed a well reasoned memorandum and supporting affidavit conclusively refuting the Defendants untenable motion and prepared to proceed with discovery.

On June 10th, of 1991 the District Court issued the Order attached hereto and identified as Appendix A quite incredibly granting the Defendants motion by selectively ignoring the Petitioners valid due process claim by misstating the facts of the case and imparting facial validity to the order by deleting the as yet unnamed parties in violation of Rule 21.

In equally bizarre developments, a panel of the Judges of the Fourth Circuit Court of Appeals affirmed the lower Courts ruling on September 13th, 1991 and on October 18th, 1991 the Petitioner's Petition for rehearing was denied without a single member of the court requesting a poll on the suggestion for rehearing in banc.

V.
REASONS FOR GRANTING THE WRIT

This case presents this court with an absolute obligation to reaffirm the sanctity of constitutionally guaranteed due process whenever significant liberty interests are jeopardized.

Beginning with the probationary Deputies' election to attempt a coverup of their indiscretion rather than frankly admit their misdeed, the progress of this case appears to be one of the most bizarre tangled webs ever woven. The District Court's conduct, though unexpected, can be explained and is properly the subject of separate and continuing inquiry. The conduct of the Court of Appeals is much more difficult to understand and if the result of misguided allegiance to a fellow jurist it was misguided indeed.

This Court's obligation to reiterate one of our most basic rights and prevent a dangerous precedent from being set is, however, as clear as the history of this case is confusing. The authorities which could be cited are almost as numerous as sand and the vast majority are antiquated due to the principal being so firmly established. Though the Court of Appeals decision is in direct conflict with numerous decisions of other courts of appeal such as Alexander v. Ware, 714 F.2nd 416, 419 (5th Cir. 1983) and numerous decisions of this Court such as Wolff v. McDonnell, 418 U.S. 539, 94 S.Ct 2963, 41 L.Ed 2d 935 (1979) no case better exemplifies the absurdity of this matter having to have been brought to the attention of this Court and the absolute necessity of this Courts attention than its own decision in Carey v. Piphus, 55 L.Ed 2d 252, 435 U.S. 247, 93 S. Ct 1042 (1978).

VI.
CONCLUSION

This case presents an important constitutional issue regarding the exact boundaries of the due process clause of the Fifth Amendment. This courts failure to act would do everything to encourage and nothing to discourage official misconduct and allow a dangerous precedent to be established that other lower courts might unwisely choose to adopt.

Respectfully submitted,

/s/

John D. MacLeod III
Bland Correctional Center
Route 2, BOX 143
Bland, VA 24315-9615

DATED: January 13, 1992

CERTIFICATE OF SERVICE

I hereby certify, under penalty of perjury, that a true copy of the foregoing Petition has been mailed to Conrad M. Shumadine and Mark D. Stiles, WILCOX & SAVAGE P.C., 1800 Sovran Center, Norfolk, VA 23510-2197 on the 13th day of January, 1992.

APPENDIX A

Filed June 10, 1991

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

JOHN DANIEL MacLEOD,
Plaintiff,

v. Civil Action No. 91-68-N

VIRGINIA BEACH CORRECTIONAL CENTER
and
DEPUTY HALEY,
Defendants.

ORDER

Plaintiff filed this suit pursuant to 42 U.S.C. § 1983, claiming violation of his constitutional rights. Defendants moved for summary judgment. Plaintiff has responded with a brief and affidavits, and the matter is ready for decision. For the reasons stated below, defendants' motion for summary judgment is GRANTED and the case is DISMISSED.

Plaintiff John Daniel MacLeod alleges that on July 8th, 1990, while incarcerated at the Virginia Beach Correctional Center, plaintiff was falsely charged with a major violation of jail regulations, namely, tampering with the lock mechanism on the door to his cell. As a result, he was confined to his cell pending a hearing, and subsequently was denied visitation with his sister and her three

children. Plaintiff seeks $350.00 in reimbursement for travel expenses and $10,000.00 in punitive damages.

The prison's Inmate Violation Report states that at 1:50 a.m. on July 8, 1990,

> while conducting a lock down of 2J, Cell 7 refused to secure. It was discovered that a checker, or similar object, was preventing the door from securing. MacLeod was ordered to remove the object, but another inmate from the floor did instead. The cell then was secured properly.[1]

According to the affidavit of Major Willard Smith, commanding officer at the jail, tampering with a security device is a major violation of prison regulations. The watch commander determined MacLeod to be a security risk and recommended that MacLeod be confined to his cell with a loss of all privileges pending further review. Major Smith reviewed the matter the next day, July 9, and dismissed the charge with a warning. No further action was taken against MacLeod.

The court initially observes that plaintiff has brought suit only against the deputy who reported the alleged offense, and not the officers who could be considered to have disciplined him, the watch commander and Major Smith. The Court is not aware of any case holding that the mere filing of a charge, absent disciplinary action, gives rise to a § 1983 claim.

Plaintiff contends that he never placed any object to obstruct the lock mechanism and that he never refused to obey an order from a deputy. Regardless of his objection to the filing of a charge against

[1] A different copy of the same form indicates that plaintiff did in fact remove the object. The disparity does not appear to be material.

him, plaintiff cannot maintain that he was in any way denied due process in the resolution of the charge, inasmuch as it was dismissed the day after it was filed. Plaintiff received all the process due him under the ruling in Wolff v. McDonnell, 418 U.S. 539 (1976). Plaintiff seems to object to the fact that the charge was dismissed with a warning, "which, being tantamount to a motion to nolle prosequi, infers that the Plaintiff was, in fact, guilty of the offense but was not prosecuted for reasons unknown." This objection is frivolous, as plaintiff suffered no adverse consequence as a result of the dismissal with a warning.

Plaintiff can only complain, if at all, about the denial of privileges during the interim period between the filing of the charge and its dismissal. Prison authorities have wide latitude, and indeed a positive obligation, to take reasonable measures to guarantee the security of the prison. Hudson v. Palmer, 468 U.S. 517, 526-27. In this case, a prison guard discovered that a cell lock mechanism had been tampered with and suspected plaintiff to be responsible. The watch commander determined plaintiff to be a security risk, and confined him to his cell for a period of less than 48 hours. This cannot be said to be unreasonable.

In any event, the only deprivation suffered by plaintiff during his confinement was loss of visitation privileges. However, visitation is not a liberty interest protected by the due process clause. Kentucky Dep't of Corrections v. Thompson, 109 S. Ct. 1904, 1908-09 (1989); White v. Keller, 438 F. Supp. 110 (D. Md. 1977), aff'd, 588 F. 2d 913 (4th Cir. 1978) (adopting the district court opinion). Visitation is "at best a non-fundamental right, and hence may not only be restricted, but may be restricted by other than the least drastic means." White v. Keller, 438 F. Supp. at 118. Although plaintiff has not alleged that prison regulations created such a liberty interest, even if they did, plaintiff was afforded sufficient procedural due

process in the deprivation of those rights. See Kentucky Dep't of Corrections v. Thompson, 109 S. Ct. at 1908-10.

For the foregoing reasons, defendants' motion for summary judgment is GRANTED and the complaint is DISMISSED.

Plaintiff is ADVISED that he may appeal from this final order by forwarding a written notice of appeal to the Clerk of the United States District Court, Room 193 U.S. Courthouse, 600 Granby Street, Norfolk, Virginia 23510, which said written notice must be received by the Clerk within thirty (30) days from the date of this order and may be filed without the prepayment of costs or giving security therefore.

The Clerk is DIRECTED to send a copy of this order to the plaintiff and to counsel for the defendants.

IT IS SO ORDERED.

/s

United States District Judge

At Norfolk, Virginia
June 10, 1991

APPENDIX B

UNPUBLISHED

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

JOHN DANIEL MACLEOD,
PLAINTIFF-APPELLANT,

v.

VIRGINIA BEACH CORRECTIONAL CENTER;
DEPUTY HALEY,
DEFENDANTS-APPELLEES.

No. 91-7121

Appeal from the United States District Court
for the Eastern District of Virginia, at Norfolk.
Robert G. Doumar, District Judge.
(CA-91-68-N)

Submitted: July 15, 1991

Decided: September 13, 1991

Before HALL, MURNAGHAN, and WILKINSON, Circuit Judges.

Affirmed by unpublished per curiam opinion.

COUNSEL

John Daniel MacLeod, Appellant Pro Se, Mark Douglas Stiles, WILCOX & SAVAGE, Norfolk, Virginia, for Appellees.

Unpublished opinions are not binding precedent in this circuit. See I.O.P. 36.5 and 36.6.

OPINION

PER CURIAM:

John Daniel MacLeod appeals from the district court's order denying relief under 42 U.S.C. § 1983. Our review of the record and the district court's opinion discloses that this appeal is without merit. Accordingly, we affirm on the reasoning of the district court. *MacLeod v. Virginia Beach Correctional Center*, CA-91-68-N (E.D. VA. June 14, 1991). We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the Court and argument would not aid the decisional process.

AFFIRMED

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FILED
October 18, 1991

No. 91-7121

JOHN DANIEL MACLEOD
Plaintiff-Appellant

v.

VIRGINIA BEACH CORRECTIONAL CENTER;
DEPUTY HALEY
Defendants - Appellees

On Petition for Rehearing with
Suggestion for Rehearing in Banc

Appellant has filed a motion for reconsideration of his petition for rehearing with suggestion for rehearing in banc. The motion for reconsideration is granted.

No member of the Court requested a poll on the suggestion for rehearing in banc, and the original judicial panel voted to deny the petition for rehearing.

The Court denies the petition for rehearing with suggestion for rehearing in banc.

Entered at the direction of Judge Hall, with the concurrence of Judge Murnaghan and Judge Wilkinson.

For the Court,

/s/
John M. Greacen, Clerk

APPENDIX D

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, DC 20543

WILLIAM K. SUTER
CLERK OF THE COURT

AREA CODE 202
479-3011

January 23, 1992

John D. MacLeod, III, #183041
Bland Correctional Center
Route 2, Box 143
Bland, Virginia 24315-9615

RE: MacLeod v. Virginia Beach Correctional Center, et al.

Dear Mr. MacLeod:

The above-entitled petition for a writ of certiorari was postmarked January 14, 1992 and received January 15, 1992. The papers are returned for the following reason(s):

No motion for leave to proceed in forma pauperis, signed by the petitioner or by counsel, is attached. See Rule 39.

No notarized affidavit or declaration of indigency is attached. See Rule 39. You may use the enclosed form.

Very truly yours,

In Forma Pauperis Department
(202) 479-3025

Enlosures: